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# From *Crawford v. Washington* to *United States v. Hendricks* and Beyond: The Confrontation Clause Confronts The Federal Rules of Evidence – Where Are We Now?

## I. INTRODUCTION

On March 8, 2004, the United States Supreme Court drastically changed the application of the Confrontation Clause of the United States Constitution to criminal cases as it interacts with the Federal Rules of Evidence in the case of *Crawford v. Washington*.<sup>1</sup> Generally, hearsay statements that might have been admitted under prior Confrontation Clause jurisprudence based on the case of *Ohio v. Roberts*<sup>2</sup> are no longer admissible if the witness is unavailable to testify at trial and the statement is deemed “testimonial.” The Supreme Court left extreme uncertainty as to the distinction between “testimonial” and “nontestimonial” statements.<sup>3</sup> As the lower courts struggle to define the barriers of the *Crawford* rule, the question then becomes how practicing attorneys should handle *Crawford*’s treatment of the Confrontation Clause.

Articles have been written addressing the effect of *Crawford* on cases involving domestic violence, child abuse, or other so-called victimless prosecution cases.<sup>4</sup> This comment begins with a brief background section explaining the pre-*Crawford* law, the enormous impact that *Crawford* had on that law, and how the *Craw-*

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1. See Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Revamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 2005 S.D. L. REV. 41, 41 (2005).

2. 448 U.S. 56 (1980). The rule from *Roberts* will be discussed in further detail below. Generally, the rule states that if a witness is available, that witness must testify to satisfy the confrontation clause; if not available, out-of-court statements may be used in-court and not violate the confrontation clause if such statements are deemed to have an “indicia of reliability” or are admitted pursuant to a “firmly rooted exception” to the hearsay rule. *Roberts*, 448 U.S. at 66.

3. Federal and state courts use “nontestimonial” and “non-testimonial” interchangeably.

4. See Hutton, *supra* note 1, at 41. See also Andrew King-Ries, *Crawford v. Washington: The End of the Victimless Prosecution*, 28 Seattle U. L. REV. 301 (2005); Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause From the Hearsay Rule*, 56 S.C. L. REV. 185 (2004).

*ford* rule has been interpreted subsequently in the various federal circuit and Pennsylvania courts. Emphasis is placed on the Third Circuit's application of *Crawford* discussed in light of the recent effect and potential future effect that *United States v. Hendricks*<sup>5</sup> has had, and possibly will have, on Pennsylvania courts' interpretation of the *Crawford* rule.

## II. BACKGROUND TO CRAWFORD: *OHIO V. ROBERTS* AND *LILLY V. VIRGINIA*

Prior to *Crawford v. Washington*,<sup>6</sup> Confrontation Clause jurisprudence was governed by the case of *Ohio v. Roberts*.<sup>7</sup> The Confrontation Clause rule derived from *Roberts* was very much intertwined with the application of the Federal Rules of Evidence.<sup>8</sup> The out-of-court testimony at issue in *Roberts* was given by the defendant's daughter at his preliminary hearing.<sup>9</sup> The defendant had been prosecuted for using his daughter's credit card without authorization.<sup>10</sup> When he called his daughter to testify at the preliminary hearing, she did so, but without giving any exculpatory evidence.<sup>11</sup>

At the time of trial, the daughter was unavailable to testify,<sup>12</sup> so the government attempted to introduce her preliminary hearing testimony against the defendant.<sup>13</sup> Rather than exclude the evidence because the defendant did not have the opportunity to cross-examine the witness, the Supreme Court admitted it on the basis that the testimony was both necessary and reliable.<sup>14</sup>

The famous Confrontation Clause test from *Roberts* stated that if a witness was unavailable for trial, an out-of-court statement may be used if it had sufficient "indicia of reliability."<sup>15</sup> "Indicia of reliability" may be found when there is either a firmly rooted exception to the hearsay rule or circumstantial guarantees of trust-

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5. 395 F.3d 173 (3d Cir. 2005).

6. 541 U.S. 36 (2004).

7. *Roberts*, 448 U.S. 56.

8. See Hutton, *supra* note 1, at 41.

9. *Roberts*, 448 U.S. at 58.

10. *Id.*

11. *Id.*

12. "Between November 1975 and March 1976, five subpoenas for four different trial dates were issued to Anita at her parents' Ohio residence. The last three carried a written instruction that Anita should 'call before appearing.' She was not at the residence when these were executed. She did not telephone and she did not appear at trial." *Id.*

13. *Id.* at 59-61.

14. *Roberts*, 448 U.S. at 70-73.

15. *Id.* at 66.

worthiness of the out-of-court statement at issue.<sup>16</sup> The Supreme Court explained in *Roberts* that if an out-of-court statement fell within a firmly rooted hearsay exception, or if that statement possessed circumstantial guarantees of trustworthiness, then a court would consider it so reliable that cross-examination would be rendered meaningless.<sup>17</sup>

After *Roberts*, the Confrontation Clause rule was modified. It was later explained that the availability of a witness was significant only as or when as indicated by the Federal Rules of Evidence.<sup>18</sup> For example, the Federal Rules of Evidence make it clear that prior statements by a witness admitted under Federal Rule of Evidence 801(d)(1) are admitted as non-hearsay, and availability is required.<sup>19</sup>

By 1999, the courts had retreated from the *Roberts* rule. In *Lilly v. Virginia*,<sup>20</sup> the Court applied the *Roberts* test to hearsay admissible as a declaration against interest.<sup>21</sup> In that analysis, several justices expressed dissatisfaction with the *Roberts* test, stating that the test was ineffective as mandating compliance with the Confrontation Clause.<sup>22</sup> In response to the Supreme Court's general abhorrence for the *Roberts* rule and the Justices' reluctance in following it, *Roberts* was overruled five years later in *Crawford v. Washington*.<sup>23</sup>

16. *Id.* The "circumstantial guarantees of trustworthiness" category was meant to encompass the "firmly rooted exception to the hearsay rule" category. See *Idaho v. Wright*, 497 U.S. 805, 821 (1990).

17. *Roberts*, 448 U.S. at 66. See *White v. Illinois*, 502 U.S. 346, 355-57 (1992).

18. See Hutton, *supra* note 1, at 43-44. See also FED. R. EVID. 801(d).

19. FED. R. EVID. 801(d).

20. 527 U.S. 116 (1999).

21. See FED. R. EVID. 804(b)(3). This rule provides that a declaration against interest is:

a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

*Id.*

22. *Lilly*, 527 U.S. at 116. The United States Supreme Court reversed the state supreme court and held that an admission of a declaration against interest violated the defendant's rights under the Confrontation Clause. *Id.* at 139-40. The Court found that the declaration against penal interest category is not based on an assumption that all statements are trustworthy, but is instead based on the common sense notion that one is unlikely to make up a statement that goes against his own interest. *Id.* at 126-27.

23. 541 U.S. 36 (2004).

III. *CRAWFORD V. WASHINGTON*

In *Crawford v. Washington*, the Supreme Court finally acted on its distaste for the *Roberts* rule.<sup>24</sup> In that case, petitioner Michael Crawford stabbed a man who supposedly raped his wife, Sylvia.<sup>25</sup> At trial, Sylvia was unavailable to testify, and the State of Washington played her tape-recorded statement to the police that detailed the stabbing even though the petitioner had not had an opportunity to cross-examine her.<sup>26</sup> The Washington Supreme Court concluded that Sylvia's statement possessed adequate "indicia of reliability," and thus passing the *Roberts* test, and that it was therefore admissible.<sup>27</sup>

The United States Supreme Court reversed the decision of the Washington Supreme Court and overruled *Roberts* with respect to "testimonial" statements. The Court concluded that the State should not have been allowed to admit Sylvia's statement against the petitioner because her recorded statement qualified as testimonial evidence, the witness was unavailable to testify at trial, and the petitioner did not have a prior opportunity to cross-examine her.<sup>28</sup>

Writing for the majority, Justice Scalia went on at length about the historical purpose of the Confrontation Clause. He stated:

[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte*<sup>29</sup> examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The

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24. *Crawford*, 541 U.S. 36.

25. *Id.* at 38.

26. *Id.* The witness, Sylvia, did not testify because of the state marital privilege, which generally bars a spouse from testifying against other spouse without the other spouse's consent. *Id.* at 40.

27. *Id.* The Washington Supreme Court upheld Crawford's conviction. *Id.*

28. *Id.* at 68-69.

29. "Ex parte" means done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested. BLACK'S LAW DICTIONARY 616 (8th ed. 2004).

Sixth Amendment must be interpreted with this focus in mind.<sup>30</sup>

The United States Supreme Court reiterated its rejection of the position that the Confrontation Clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial depended upon the “law of Evidence for the time being.”<sup>31</sup> The majority discussed historical sources of the Confrontation Clause and explained that there is very little evidence to suggest that exceptions to the general rule excluding hearsay evidence applied to “*testimonial*” statements against the accused in a *criminal* case.<sup>32</sup> The Court gave examples of such exceptions, one of which included business records or statements in furtherance of a conspiracy. Other hearsay exceptions that the Court found to the contrary involved dying declarations<sup>33</sup> and forfeiture by wrongdoing.<sup>34</sup> The majority also emphasized repeatedly that the Confrontation Clause does not permit the use of out-of-court testimony unless the witness is unavailable and the defendant had a prior opportunity to cross-examine.<sup>35</sup>

The Court went into great detail to explain the importance of Confrontation Clause rights in light of “*testimonial*” statements, stating:

Involvement of government officers in a production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and time again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad,

30. *Crawford*, 541 U.S. at 50-51 (emphasis in original).

31. *Id.*

32. *Id.* at 59 (emphasis in original).

33. *Id.* at 56 n.6. A dying declaration is when “[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.” FED. R. EVID. 804(b)(2).

34. *Crawford*, 541 U.S. at 56. Regarding the forfeiture by wrongdoing exception, the Court stated that “the existence of that exception as a general rule of criminal hearsay law cannot be disputed.” *Id.* Forfeiture by wrongdoing is “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” FED. R. EVID. 804(b)(6).

35. *Crawford*, 542 U.S. at 52-54.

modern, hearsay exception, even if that exception might be justifiable in other circumstances.<sup>36</sup>

While the Supreme Court never defined "testimonial" in a clear and concise way, Justice Scalia alluded to potential definitions, indicating that "testimonial" statements included affidavits, custodial examinations, prior testimony, or other pretrial statements that are anticipated to be used by the prosecution in a criminal case.<sup>37</sup> Nevertheless, the fact that the *Crawford* Court was never clear in its description of "testimonial" left open whether a subjective, objective, or hybrid standard applies, and from whose point of view (whether it be the declarant, the taker of the statement, or a hypothetical reasonable person in similar circumstances) it is determined whether a statement is testimonial.<sup>38</sup>

Justice Scalia attempted to generally define "testimonial," by first referring to it as meaning "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>39</sup> He further expanded upon this definition, proclaiming that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."<sup>40</sup>

Additionally, he acknowledged that there are "various formulations" of the concept and went on to identify three specific types.<sup>41</sup> First, Justice Scalia addressed "ex parte in court testimony or its functional equivalent."<sup>42</sup> He found that "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially" to fall under the category of "testimonial."<sup>43</sup> Second, he referred to "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions" and deemed these items to be testimonial statements.<sup>44</sup> Third, Justice Scalia addressed "state-

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36. *Id.* at 56.

37. *Id.* at 51.

38. *Id.* at 51-52.

39. *Id.* at 52.

40. *Crawford*, 541 U.S. at 51.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 52.

ments that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>45</sup> Justice Scalia complicated the matter further by identifying a potential fourth variation which included “statements taken by police officers in the course of interrogations.”<sup>46</sup>

As one can readily see, Justice Scalia’s formulations are very different from one another, especially with respect to the standard and point of view from which the statement is to be analyzed.<sup>47</sup> The third viewpoint is different from the first two in that it requires the view of an outside, objective witness.<sup>48</sup> Additionally, the fact that Justice Scalia did not expand upon and clarify his related formulations or explain how one interacts with the others leaves both prosecutors and defense attorneys guessing as to what exactly constitutes a “testimonial” statement.

In trying to reconcile Justice Scalia’s open-ended definition of testimonial statements, lower courts have, and will continue to struggle to apply the *Crawford* rule both correctly and consistently. Before examining how other courts have interpreted *Crawford*, one must generally understand where the *Crawford* decision attempts to leave the Confrontation Clause analysis. If a witness is available, he should testify, and when he does, the requirements of the Confrontation Clause are met by in-court cross examination. If a witness is unavailable to testify at trial, his previous statements, if deemed “testimonial,” are inadmissible, unless there was a prior opportunity to cross-examine. This is true *regardless* of whether the Federal Rules of Evidence authorize the admission of the testimonial out-of-court statements.

#### IV. UNITED STATES V. HENDRICKS AND SUBSEQUENT THIRD CIRCUIT CASES

In *United States v. Hendricks*,<sup>49</sup> the Third Circuit made its first attempt to interpret the meaning of “testimonial evidence.”<sup>50</sup> Joining other courts, it held that monitored conversations pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of

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45. *Crawford*, 541 U.S. at 52.

46. *Id.* at 52.

47. *Id.* at 51-52.

48. *Id.*

49. 395 F.3d 173 (3d Cir. 2005).

50. *Hendricks*, 395 F.3d at 180.



1968<sup>51</sup> do not fall under the category of testimonial for purposes of the *Crawford* rule.<sup>52</sup>

Additionally, the *Hendricks* court held that

[I]f a [d]efendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context."<sup>53</sup>

The facts surrounding *Hendricks* were relatively typical in the criminal arena. On April 11, 2003, Craig Hendricks was one of several defendants charged with one or more counts of conspiracy, narcotics possession and distribution, and money laundering.<sup>54</sup> On January 12, 2004, the United States filed a motion in limine seeking pretrial rulings pertaining to the admissibility of, *inter alia*, electronic surveillance tapes obtained pursuant to a court authorized wiretap and recordings of conversations between confidential informant Hector Rivera (hereinafter "CI Rivera") and various defendants.<sup>55</sup> The United States asserted that these statements

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51. *Id.* at 182.

Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, a duly authorized law enforcement officer must obtain approval from the United States Attorney General or a designated Assistant Attorney General in order to apply to a federal judge for approval to intercept and record wire communications. Once such approval is obtained, the officer must present to a judge a written application for a wiretap, which must contain an adequate and particularized showing of probable cause. It must also contain a showing of necessity, and explain why normal investigative techniques would be of no avail. The Government must further take steps to minimize the monitoring of nonpertinent conversations and otherwise to limit invasions of privacy. In the instant case, the District Court determined that the wiretaps at issue were legally sufficient in terms of authority, probable cause, necessity, and minimization. Those findings are not before this court.

*Hendricks*, 395 F.3d at 180-81 (internal citations and quotations omitted). See 18 U.S.C. §§ 2510-2513 (2004).

52. 220 No. 3 *West's Criminal Law News* 25 (February 10, 2005).

53. *Hendricks*, 395 F.3d at 184.

54. *Id.* at 175. The other defendants were Andy Antoine, Jacquelyn Carr, Rafael Cintron, Rudolph Clark, Elroy Dowe, Daniel Fleming, Randy Laronde, and Russel Robinson. *Id.* The indictment indicated that Hendricks was the leader of the large scale narcotics organization that imported and distributed cocaine throughout the entire United States Virgin Islands and elsewhere. *Id.*

55. *Id.*

qualified as either admissions by party opponents,<sup>56</sup> co-conspirator statements,<sup>57</sup> or as statements covered by the residual hearsay exception<sup>58</sup> and were thus admissible at trial.<sup>59</sup>

In light of the Supreme Court's announcement of the *Crawford* rule, the district court concluded that, since the defendants never had the opportunity to cross-examine CI Rivera, and since CI Rivera would be unavailable to testify at trial due to his death, the United States could not introduce the conversations involving CI Rivera at trial.<sup>60</sup>

The United States filed a motion for reconsideration, in which it noted that *Crawford* applies only to testimonial hearsay statements.<sup>61</sup> The government further argued that nontestimonial hearsay statements are still subject to the *Roberts* test and may be admitted on that basis.<sup>62</sup> The district court denied the motion, finding that the evidence at issue qualified as testimonial and was thus subject to the *Crawford* rule.<sup>63</sup>

56. See FED. R. EVID. 801(d)(2)(A), which provides:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

*Id.*

57. See FED. R. EVID. 801(d)(2)(E). Rule 801(d)(2)(E) provides that "[a] statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.*

58. See FED. R. EVID. 807. The residual exception found in Rule 807 states:

A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

*Id.*

59. *Hendricks*, 395 F.3d at 175.

60. *Id.* at 176. The United States argued that the defendants were responsible for CI Rivera's death and has thus forfeited by wrongdoing any protection offered by Federal Rule of Evidence 804(b)(6) and the Confrontation Clause of the Sixth Amendment. The Third Circuit rejected this argument because there was not enough evidence to show that the defendants did, indeed, cause the death of CI Rivera. *Id.* at 176 n.5.

61. *Id.* (citing *Crawford*, 541 U.S. at 68).

62. *Hendricks*, 395 F.3d at 176.

63. *Id.*

The United States then filed an interlocutory appeal, which brought the issue to the Third Circuit. There, the court said:

The lynchpin of the *Crawford* decision thus is its distinction between testimonial and nontestimonial hearsay; simply put, the rule announced in *Crawford* applies only to the former category of statements. As the Court explained: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' decision to afford . . . flexibility in the [] development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from the Confrontation Clause scrutiny altogether." Thus, unless a particular hearsay statement qualifies as "testimonial," *Crawford* is inapplicable and *Roberts* still controls.<sup>64</sup>

The Third Circuit went on to state that, while the *Crawford* Court specifically left open the precise definition of "testimonial," it did provide some points of reference.<sup>65</sup> The Third Circuit discussed the four potential definitions of testimonial and stated how various courts of appeals have struggled with determining the precise definition of "testimonial" hearsay.<sup>66</sup> It discussed examples of how the courts have defined "testimonial" since *Crawford*, like *United States v. Rodriguez-Marrero*,<sup>67</sup> where the First Circuit concluded that a defendant's signed confession, presented under oath to the prosecutor constituted testimonial hearsay within the definition of *Crawford*; *United States v. Cromer*,<sup>68</sup> where the Sixth Circuit found that a statement made knowingly to authorities that describes criminal activity is almost always testimonial, and concluded that the confidential informant's statement to police that implicated the defendant in criminal activity was testimonial hearsay; and *United States v. Bruno*,<sup>69</sup> in which the Second Circuit said that a plea allocution transcript and grand jury testimony of a witness who was unavailable for trial constituted "testimonial" hearsay.

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64. *Id.* at 179.

65. *Hendricks*, 395 F.3d at 179. See also *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004).

66. *Hendricks*, 395 F.3d at 179-80.

67. 390 F.3d 1, 17 (1st Cir. 2004).

68. 389 F.3d 622, 674 (6th Cir. 2004).

69. 383 F.3d 65, 68 (2d Cir. 2004).

After explaining the specific procedure involved in obtaining a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>70</sup> the Third Circuit went on to state that the recorded statements at issue were not similar to any of the examples of testimonial statements specifically listed by the Supreme Court in *Crawford*.<sup>71</sup> The court said, however, that even under the broadest definition of “testimonial,” statements made to confidential informants were not “testimonial” because the declarants clearly did not make these statements believing that they would be available for use in a later trial.<sup>72</sup> Accordingly, the *Hendricks* court found wiretap recordings to be more similar to a “casual remark to an acquaintance” than a formal statement to government officers, thus making these recordings nontestimonial in nature and not subject to *Crawford*.<sup>73</sup>

Regarding the conversations between the defendants and CI Rivera, the district court rendered these statements “testimonial” under the most expansive definition provided by the *Crawford* Court.<sup>74</sup> The district court reasoned that gaining evidence against defendants for use as part of an investigation and prosecution was covered by *Crawford*.<sup>75</sup> On appeal, the Third Circuit admitted that such an analysis was appealing because the conversations reasonably could have been categorized as involving statements that CI Rivera expected to be used prosecutorially; however, the *Crawford* case cited with approval *Bourjaily v. United States*,<sup>76</sup> a case in which the Supreme Court rejected a Confrontation Clause argument regarding communications between a confidential informant and co-defendant.<sup>77</sup> Because these statements constituted admissions by the co-defendant, the circuit court held that they were clearly nonhearsay and thus not subject to *Crawford*.<sup>78</sup>

Under the circumstances in *Hendricks*, the Third Circuit found that the government should have been able to introduce the statements made by CI Rivera to the co-defendant in order to put the statements made by the other party into context so that the jury may more readily recognize the co-defendant’s statements as

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70. 18 U.S.C. § 2510 *et seq.* (2005).

71. *Hendricks*, 395 F.3d at 181.

72. *Id.* at 181.

73. *Id.*

74. *Id.* at 182.

75. *Id.*

76. 483 U.S. 171 (1987).

77. *Hendricks*, 395 F.3d at 182.

78. *Id.* at 183.

admissions.<sup>79</sup> In other words, the statements made by CI Rivera were not hearsay because they were not out-of-court statements being offered for the truth of the matter asserted; rather, they were being offered for their effect on the hearer.

Soon after the decision in *Hendricks*, the Third Circuit faced a similar issue in *United States v. Briscoe-Bey*,<sup>80</sup> where the defendant was convicted for the distribution of more than five hundred grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).<sup>81</sup> Using the Federal Sentencing Guidelines, the Third Circuit sentenced the defendant to 188 months in jail followed by a four-year term of supervised release.<sup>82</sup> The defendant appealed,<sup>83</sup> asserting that the district court violated his rights under the Confrontation Clause to confront witnesses against him when it admitted audiotapes and testimony by a case agent regarding statements made by a government informant who did not testify at trial because neither party called him as a witness.<sup>84</sup>

In response, the Government argued that the defendant did not point to any place in the record where he objected to any evidence on the basis of the Confrontation Clause.<sup>85</sup> Therefore, the claimed error was not subject to review.<sup>86</sup>

The Third Circuit rejected the Government's position and decided that it would examine the defendant's Confrontation Clause argument subject to plain error.<sup>87</sup> Noting that the rule from *Crawford* had recently been applied by the Third Circuit in *United States v. Hendricks*, the Third Circuit concluded in one sentence that there was no Confrontation Clause violation in this case.<sup>88</sup> Rather than discussing how *Crawford* and *Hendricks* applied to

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79. *Id.* at 184.

80. 126 F. App'x 551 (3d Cir. 2005).

81. *Briscoe-Bey*, 126 F. App'x at 551. This opinion was not selected for publication in the Federal Reporter and is not precedential. *Id.*

82. *Id.* The defendant's sentencing range was from 155 to 188 months. *Id.*

83. *Id.* The defendant appealed his conviction based on two sentencing issues arising from the application of the Federal Sentencing Guidelines to his conviction. *Id.* The defendant argued first that the district court erred in admitting the audiotapes and testimony by case agent Hughes regarding the statements of government informant because they constituted inadmissible hearsay, and, second, that the district court violated the defendant's rights under the Confrontation Clause to confront the witnesses against him. *Id.*

84. *Id.* The government informant was Ernest Morris, the receiver of the cocaine. *Id.*

85. *Id.* The defendant did not dispute that he did not raise a Confrontation Clause argument in the district court. *Id.*

86. *Briscoe-Bey*, 126 F. App'x at 551.

87. *Id.* See *Government of the Virgin Islands v. Rosa*, 299 F.3d 283, 290 (3d Cir. 2005).

88. *Briscoe-Bey*, 126 F. App'x at 551.

the facts of the case, the court focused on the amount of evidence against the defendant.<sup>89</sup>

Regarding whether or not the testimony at issue in *Briscoe-Bey* was indeed testimonial, the analysis should have been identical to that of *Hendricks*. The declarant, the defendant in *Briscoe-Bey*, did not, at the time of making the statement, reasonably expect that the statement might be used in further judicial proceedings. The defendant made the statements for one purpose only: to sell narcotics. Accordingly, these statements were akin to that of the defendant to CI Rivera in *Hendricks*. Why then did the Third Circuit not just explain that the statements at issue were not subject to *Crawford* because they are nontestimonial? Furthermore, why did the court fail to mention that the government should have been able to introduce the statements made by the informant to the co-defendant in order to put the statements made by the other party into perspective? This would have permitted the jury to more readily recognize the defendant's statements as admissions.

Rather than mirroring its analysis in *Hendricks*, the circuit court said that proper consideration had been given to *Crawford* and *Hendricks*, and it, instead, focused on the substantial amount of evidence against the defendant. Where does amount of evidence against the defendant have any place in a Confrontation Clause analysis according to *Crawford*? Such a fundamental right embedded in the Bill of Rights should not and cannot be outweighed by any amount of evidence.

Where does this leave the Third Circuit in its application of *Crawford* and *Hendricks*? Are prosecutors, defense attorneys, and others just supposed to sick back idle and not question the Third Circuit's unexplained application of the *Crawford* rule? Even though there was a large amount of evidence against the defendant in *Briscoe-Bey*, does a potential violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution not warrant some explanation? If the Confrontation Clause was violated, such error would be irreversible due to the important nature of the right violated.

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89. *Id.* The Third Circuit found the evidence against the defendant to be overwhelming and instead of setting forth that evidence at length, the court quoted a portion of a conversation between the defendant and the governmental informant. *Id.* The majority opinion concluded by saying nothing more than that the conversation reflected the initiation of a narcotics transaction. *Id.* Even though there was "overwhelming evidence against the defendant," the Third Circuit vacated the sentence and remanded the case to district court to address the defendant's contentions. *Id.*

Furthermore, what role does potential poor lawyering play in the Confrontation Clause analysis? Why would neither party call the governmental informant to testify, and how, if at all, does that affect the application of the *Crawford* rule?

The Third Circuit had the opportunity to revisit its decisions in *Hendricks* and *Brisco-Bey* in the case called *United States v. Johnson*.<sup>90</sup> In *Johnson*, the defendant had been convicted of numerous drug charges which he appealed, claiming that the admission of recorded conversations between himself and co-conspirators violated his Sixth Amendment right to confront witnesses because the co-conspirators did not testify, and the government did not show that the co-conspirators were unavailable.<sup>91</sup>

The Government argued that there were three types of statements on the tapes that had been admitted, all of which were admissible under the Federal Rules of Evidence as some type of non-hearsay.<sup>92</sup> In response, the court noted that the appellant did not challenge the admissibility of such evidence under the Federal Rules of Evidence; rather, appellant focused his appeal on the rights conferred by the Confrontation Clause, and those rights are not satisfied by the requirements provided by the Federal Rules of Evidence.<sup>93</sup>

The Third Circuit relied on the fact that the Supreme Court had limited its holding in *Crawford* to "testimonial" statements,<sup>94</sup> and as such the previous jurisprudence from *Ohio v. Roberts*, which allowed the admission of nontestimonial statements, remained intact. Accordingly, the Third Circuit affirmed the ruling of the district court and found that the admission of the statements without requiring the prosecution to show unavailability did not

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90. 119 F. App'x 415 (3d Cir. 2005). This case was not selected for the Federal Reporter and is not precedential. *Johnson*, 119 F. App'x at 415.

91. *Id.*

92. *Id.* at 417. First, the statements of the appellant himself are admissions by a party opponent, admissible under Federal Rule of Evidence 801(d)(2)(A). *Id.* Second, statements of individuals other than appellant recorded from a wiretap constitute statements made by a co-conspirator and are admissible under Federal Rule of Evidence 801(d)(2)(E). *Id.* Third, the statements of the confidential informant fall under Federal Rule of Evidence 801(c) as nonhearsay because they were not being offered for the truth of the matter asserted; rather, they were offered to provide context to appellant's admissions. *Id.*

93. *Id.* at 417-18. In *Crawford*, the United States Supreme Court warned that "leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Id.* at 419 (citing *Crawford*, 541 U.S. at 51).

94. *Johnson*, 119 F. App'x at 416.

violate the defendant's Confrontation Clause rights and did not constitute plain error.<sup>95</sup>

Before examining the application of *Crawford*, the Third Circuit discussed the case of *United States v. Inadi*,<sup>96</sup> where the Supreme Court held that the Confrontation Clause does not require the government to show that co-conspirators were unavailable as a condition to admit wiretap recordings.<sup>97</sup> The Third Circuit went on to state that Johnson, the appellant in this case, was urging the court to extend *Crawford* to apply to all out-of-court statements. In other words, both "testimonial" and nontestimonial statements would be inadmissible under the Confrontation Clause unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.<sup>98</sup>

In response, the Third Circuit relied upon its recent decision in *United States v. Hendricks*.<sup>99</sup> The trial court in *Hendricks* had stated that *Crawford* applied to "testimonial" evidence only and excluded wiretap statements as "testimonial," applying the definition of testimonial too broadly.<sup>100</sup> On appeal, the Third Circuit reversed the trial court's ruling, recognizing the Supreme Court's intent to maintain a distinction between "testimonial" and nontestimonial statements in the application of the *Crawford* rule.<sup>101</sup>

The *Johnson* court went on to explain in detail how the *Crawford* Court emphasized the important historical distinction between "testimonial" and nontestimonial statements. Quoting *Crawford*, the court stated:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development in hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law re-

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95. *Id.* at 419.

96. 475 U.S. 387 (1986).

97. *Johnson*, 119 F. App'x at 418 (citing *Inadi*, 475 U.S. at 400).

98. *Johnson*, 119 F. App'x at 418.

99. *Id.*

100. *Id.*

101. *Id.* The Third Circuit went on to quote Justice Scalia's majority opinion with regard to the Confrontation Clause in *Crawford*, stating that "[t]he constitutional text, like the history underlying the common-law right to confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Id.* (emphasis added).



quired: unavailability and a prior opportunity to cross-examine.<sup>102</sup>

The Third Circuit concluded by stating that since *Hendricks* held that wiretap statements and statements of defendants or their co-conspirators made during conversations with confidential informants are nontestimonial in nature, none of the statements contained in the recordings at issue fit the definition of "testimonial."<sup>103</sup>

Although *Johnson* was decided only seven days after *Hendricks*,<sup>104</sup> *Johnson* illustrates the confusion that often results from the application of the *Crawford* rule in determining whether or not an out-of-court statement is "testimonial" or nontestimonial. While the analyses in both *Hendricks* and *Johnson* are consistent with *Crawford* and one another, one has to wonder whether the *Crawford* rule will one day be extended to all out-of-court statements, "testimonial" and nontestimonial alike, so as to avoid the confusion that results when trying to draw the fine line between the two categories of statements.

In attempts to minimize confusion and to keep evidentiary analysis separate and distinct from that of Confrontation Clause analysis, the Third Circuit never mentioned how the statements at issue were admissible pursuant to the Federal Rules of Evidence.<sup>105</sup> Where does that fact, if at all, fall into the court's appli-

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102. *Id.* at 419.

103. *Johnson*, 119 F. App'x at 419.

104. *Hendricks* was decided on January 14, 2005, and *Johnson* was decided on January 21, 2005.

105. All of the statements at issue should have been admissible as nonhearsay, or exemptions to the hearsay rule:

Statements which are not hearsay include (1) when a declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is: (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving that person or if the statement is offered against a party. Statements which are not hearsay also include a statement which is offered against the party and (A) is the party's own statement in either an individual or representative capacity or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

cation of the *Crawford* rule? Case law seems to suggest that this fact is irrelevant to the *Crawford* analysis; however, the difference between hearsay and nonhearsay should not amount to a distinction without a difference, as it may be determinative of admissibility.

# V. PENNSYLVANIA: *COMMONWEALTH V. LEVANDUSKI* AND *COMMONWEALTH V. GRAY*

In *Commonwealth v. Levanduski*,<sup>106</sup> the Superior Court of Pennsylvania applied the *Crawford* rule in a very strict manner.<sup>107</sup> In *Levanduski*, appellant Terry Lynn Levanduski appealed her sentence to life imprisonment following her conviction by a jury for charges of first-degree murder of her common law husband, conspiracy, hindering apprehension, and solicitation.<sup>108</sup> When Levanduski returned home from work on November 22, 2002, the police were at her house and were conducting an investigation because a body had been found there.<sup>109</sup> The police had obtained valid search warrants and during their search of Levanduski's home they discovered, *inter alia*, a ripped-up five page handwritten note in the kitchen trash can.<sup>110</sup> Further investigation revealed that the note had been written by the by the victim, concerning his suspicion that the appellant and her paramour,<sup>111</sup> Leonard Fansen, were conspiring to murder him.<sup>112</sup>

Prior to trial, Levanduski filed a motion in limine to preclude the admission into evidence of the letter which had been discovered in the trash can.<sup>113</sup> This motion was granted in part and de-

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FED. R. EVID. 801(d).

106. 2005 Pa. Super. 117 (Pa. Super. Ct. 2005). The opinion previously reported at this citation has been removed from the Lexis service at the request of the court. *Id.* This opinion was withdrawn after reargument was granted *en banc* on May 27, 2005. *Id.*

107. *Levanduski*, 2005 Pa. Super. at 117.

108. *Levanduski*, 2005 Pa. Super. at \*\*1. The charges resulted from appellant's homicide of her common law husband, Robert Sandt, on November 2, 2002. *Id.*

109. *Id.* Sandt died as a result of a seven .22 caliber gun shot wounds, five of which went into his head. Sandt's body was found by a next door neighbor, appellant's mother. At the time appellant's mother discovered the body, appellant was at her place of employment. *Id.* at \*\*1-2.

110. *Id.* at \*\*2. The letter at issue here was fairly long, consisting of five pages, handwritten, describing how the victim had discovered that the appellant was having sexual relations with the co-defendant. *Id.* at \*\*6.

111. A paramour is "one taking the place without the legal rights of a husband or wife." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1638 (1986).

112. *Levanduski*, 2005 Pa. Super. at \*\*2.

113. *Id.* Appellant also filed a motion to suppress her statements to the police prior to trial. *Id.* The motion to suppress was denied. *Id.*

nied in part.<sup>114</sup> The trial judge held that the content of the letter could not be admitted to prove the truth of the matter asserted therein, but it could be admitted as evidence of motive to show the relationship of the co-defendants.<sup>115</sup> On appeal, the Pennsylvania Superior Court examined closely the rationale of the trial judge, and in support of his ruling, stated:

The letter written by the victim, which implicated defendants Levanduski and Fransen, meets this definition [of hearsay]. It was not made by the victim through testimony at a trial or hearing and it is being offered to prove that defendant Levanduski conspired to kill him. Because the letter does not fall within any exception to the hearsay rule, it is inadmissible at trial to prove the defendant Levanduski's involvement in the murder of the victim.<sup>116</sup>

With respect to the admissibility of the content of the letter as evidence of motive, the superior court went on to reiterate the trial court's findings that "when an extrajudicial statement is offered for a purpose other than proving the truth of its contents, it is not hearsay and is not excludable under the hearsay rule."<sup>117</sup> The Superior Court of Pennsylvania rejected this rationale and asserted that the letter constituted nothing more than evidence of the truth of the matter asserted.<sup>118</sup> After determining that the letter did not fall into a recognized exception to the hearsay rule, the superior court concluded that the trial court's refusal to preclude admission of this letter into evidence constituted reversible error, and a new trial was granted.<sup>119</sup>

In the *Levanduski* court's opinion, the *Crawford* rule was addressed only briefly in a footnote regarding the potential applicability of the forfeiture exception to the hearsay rules to admit the letter.<sup>120</sup> There, the court simply stated that *Crawford* held that

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114. *Id.*

115. *Id.* at \*\*4. A jury trial followed, and at its conclusion, Levanduski was found guilty, *inter alia*, of murder in the first degree and sentenced to a term of life imprisonment. *Levanduski*, 2005 Pa. Super. at \*\*2.

116. *Id.* at \*\*9.

117. *Id.* (quoting *Commonwealth v. Puksar*, 740 A.2d 219, 225 (Pa. 1999)) (additional citation omitted).

118. *Levanduski*, 2005 Pa. Super. at \*\*9-10.

119. *Id.* \*\*23. The court stated that the content was only relevant if the truth of the statements was accepted, and accordingly, it constituted hearsay. *Id.*

120. *Id.* at \*\*16 n.7.

the Confrontation Clause of the United States Constitution precludes the admission of hearsay “except in the most limited circumstances” with respect to “testimonial” statements.<sup>121</sup> The court pointed out that the Supreme Court in *Crawford* did not specifically define the terms “testimonial” and nontestimonial, but made it clear that “testimonial” statements referred to those “statements made by a declarant who at the time of making the statement would reasonably expect that the statement might be used in future judicial proceedings.”<sup>122</sup> The superior court agreed with the trial judge that the letter at issue fell into the category of nontestimonial statements because it was not given under oath or affirmation at trial or in an affidavit or deposition.<sup>123</sup>

While the letter was determined to be nontestimonial, it is still important to examine the court’s interpretation of the *Crawford* rule and its reasons as to why it did not apply to the case at hand. After reviewing the court’s analysis addressed above, the question becomes how did the court know that the victim did not write that letter reasonably expecting the statement to be used in subsequent judicial proceedings? It seems logical that if one was in great fear that he was going to be murdered, he might want to leave some sort of record of his thoughts behind so as to aid the police in their investigation with the hopes that such record would be used in judicial proceedings.

Furthermore, *Crawford* provided that statements made under oath or affirmation at trial or in an affidavit or deposition are merely examples of testimonial statements.<sup>124</sup> Nowhere in the *Crawford* opinion did the Supreme Court specifically limit “testimonial” statements to such a narrow category, yet lower courts have seemed to do just that and have justified their actions by citing to *Crawford*. It seems as though lower courts are afraid to expand the definition of testimonial beyond the few examples provided in *Crawford*.

In *Commonwealth v. Gray*,<sup>125</sup> the Pennsylvania Superior Court had the opportunity to examine the effect, if any, of the Confrontation Clause on the admissibility of hearsay testimony pursuant to the excited utterance exception under Federal Rule of Evidence

121. *Id.*

122. *Id.* (quoting *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004)) (internal quotations omitted).

123. *Levanduski*, 2005 Pa. Super. at \*\*16 n.7.

124. *Crawford*, 541 U.S. at 51-52.

125. 867 A.2d 560 (Pa. Super. Ct. 2005).

803(2).<sup>126</sup> In *Gray*, the appellant claimed that the trial court abused its discretion when it admitted out-of-court statements by the victim and another person in violation of the Confrontation Clause.<sup>127</sup> The record revealed that the out-of-court statements qualified as excited utterances, and as such, they did not fall into the category of "an extrajudicial statement contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," nor did those statements constitute "ex-parte in court testimony or its functional equivalent."<sup>128</sup>

The closest question was whether the statements fell within the category that the declarant "would have reasonably expected her statements to have been used prosecutorially."<sup>129</sup> On this issue, the superior court noted:

[I]n determining whether the statement was made with the reasonable expectation that it would be used in a prosecution, the [*Crawford*] court focused on the purpose of the statement and its intended effect, not the procedural context in which the statement was made.<sup>130</sup>

The *Gray* court went on to discuss how other courts have dealt with the issue of whether excited utterances, made to police at the scene of a crime, would qualify as testimonial statements.<sup>131</sup> Some courts have held that such statements do not constitute testimonial statements.<sup>132</sup> Other post-*Crawford* decisions have held that excited utterances are per se nontestimonial. Relying on *State v. Lopez*,<sup>133</sup> the *Gray* court stated that "[w]hether a statement falls within the third category of testimonial statements identified in *Crawford* depends upon the purpose for which the statement was made, not the emotional state of the declarant."<sup>134</sup>

In *Gray*, the excited utterance was unsolicited; it was made to the police in order to obtain assistance during the commission of a crime.<sup>135</sup> Because the declarant volunteered information in an ef-

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126. *Gray*, 867 A.2d at 569.

127. *Id.* at 572.

128. *Id.* at 574 (quoting *Crawford*, 541 U.S. at 51-52).

129. *Gray*, 867 A.2d at 574.

130. *Id.* at 576 (quoting *Lopez v. State*, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004)).

131. *Gray*, 867 A.2d at 576.

132. *Id.* at 575.

133. 888 So. 2d 693 (Fla. Dist. Ct. App. 2004).

134. *Lopez*, 888 So. 2d at 699.

135. *Gray*, 867 A.2d at 577.

fort to remedy a perceived emergency and not to create a record against another for use in a future prosecution, the court concluded that this statement was nontestimonial.<sup>136</sup> To support this conclusion, the court noted that the police officers did not ask the declarant any questions and did not write down any of her statements.<sup>137</sup> Since the declarant's statements did not arise during a formal, structured police interrogation, the court could not conclude that an objective witness would reasonably expect the statements to be available for use at a later trial.<sup>138</sup>

Clearly, the court's explanation as to why an excited utterance does not constitute information that an objective witness would reasonably expect to be available for use at later judicial proceedings narrowed the scope of the definition of "testimonial" from *Crawford*. The *Gray* court was very willing to analyze the statement at issue under each definition of testimonial provided by Justice Scalia in *Crawford*. However, since the courts are not unified in their treatment of excited utterances, how has the *Crawford* rule simplified Confrontation Clause jurisprudence? Are we not left with the same confusion and lack of clarity that we suffered from the application of the *Roberts* rule?

Furthermore, the *Gray* court applied a strictly objective standard in its analysis. It seems likely that the outcome would have been different had the applied standard been subjective or a combination of both objective and subjective reasoning in determining whether the out-of-court statements at issue were "testimonial." Would the court have been able to explain the application of *Crawford* had it chosen the liberal, subjective standard in this case? This is just one of the many questions that future analysis and modification of the *Crawford* rule will hopefully be able to answer.

The remainder of this comment considers selected cases from other circuit courts to demonstrate how they applied, or chose not to apply, *Crawford*. It is important to note that, while many of these cases were not focused entirely on the *Crawford* issue, they illustrate the confusion and uncertainty that still remains in determining when and how to apply the *Crawford* rule to out-of-court statements.

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136. *Id.*

137. *Id.*

138. *Id.*

VI. FIRST CIRCUIT: *HORTON V. ALLEN*

In *Horton v. Allen*,<sup>139</sup> the First Circuit Court of Appeals had a rather easy application of the *Crawford* rule. There, the petitioner was a prison inmate who had been sentenced to a concurrent life term of imprisonment for two first-degree murders as well as a ten-to-fifteen-year term for assault.<sup>140</sup> On appeal, Horton argued, *inter alia*, that his Sixth Amendment right to confront witnesses was violated when the trial court admitted certain hearsay testimony.<sup>141</sup> Over Horton's objection, the trial court admitted testimony from a man by the name of Henry Garcia.<sup>142</sup> Garcia had said that on the day of the murders of the victims (Manuel and Desir) Horton's accomplice, Christian, had stated that "he needed money and that Desir had refused to give him drugs on credit."<sup>143</sup> The trial court judge had admitted this testimony under the present state-of-mind exception to the hearsay rule.<sup>144</sup>

At oral argument, the application of *Crawford* to Horton's petition was debated.<sup>145</sup> The First Circuit did not address the issue of whether *Crawford* was retroactive because, in affirming the trial court's decision, it held that the *Crawford* rule did not apply to this case.<sup>146</sup> After briefly discussing how the *Crawford* rule draws a fine line between "testimonial" and nontestimonial statements, the court determined that Christian's statements did not qualify as "testimonial."<sup>147</sup> The court explained that Christian's statements during a private conversation with Garcia were not made

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139. 370 F.3d 75 (1st Cir. 2004).

140. *Horton*, 370 F.3d at 79. Horton subsequently filed a motion for a new trial, which was denied, and his subsequent direct appeal and his appeal from the denial of his new trial were also denied. *Id.*

141. *Id.* Horton's appeal raised three claims. His two other arguments were that the "trial court violated his Sixth Amendment right to a public trial by holding the individual voir dire of potential jurors in an anteroom rather than a court room;" and that his Sixth Amendment right to effective counsel was violated because his "counsel did not call certain alibi witnesses and failed to interview certain potential character witnesses." *Id.*

142. *Id.*

143. *Id.* at 83.

144. See *Commonwealth v. Horton*, 753 N.E.2d 119, 125 (Mass. 2001).

145. *Horton*, 370 F.3d at 83.

The debate in this instance was important especially because the new rules of criminal procedure do not apply to habeas corpus proceedings unless: (1) the rule places a class of private conduct beyond the power of the state to proscribe, or (2) the rule is a "watershed rule" of criminal procedure, implicating fundamental fairness and accuracy of the proceeding.

*Id.*

146. *Id.*

147. *Id.* at 84.

under circumstances in which an objective person would “reasonably believe that the statements would be available for use at a later trial.”<sup>148</sup> Because Christian’s statements were nontestimonial, they fell outside of the scope of *Crawford*, and the First Circuit applied *Roberts* to determine whether the admission of Christian’s nontestimonial hearsay statements violated Horton’s rights under the Confrontation Clause.<sup>149</sup>

## VII. SECOND CIRCUIT: *UNITED STATES V. BRUNO*

The Second Circuit Court of Appeals has indicated its willingness to follow the United States’ Supreme Court’s decision in *Crawford*. In *United States v. Bruno*,<sup>150</sup> the defendants appealed the decision of the United States District Court for the Eastern District of New York, convicting them of conspiracy and racketeering charges under the Racketeer Influenced and Corruption Organizations Act (RICO) and the Violent Crimes in Aid of Racketeering Act (VCAR).<sup>151</sup>

As to the portion of the decision that related to *Crawford* and the Confrontation Clause, the convictions for false-statement conspiracy were vacated because the district court committed plain error in admitting hearsay evidence, a plea allocution, and grand jury testimony in violation of the Confrontation Clause.<sup>152</sup>

The *Bruno* court reiterated the rule from *Crawford* and further relied on *Crawford*’s analysis to reach its conclusion that the plea allocution and grand jury testimony was testimonial evidence admitted in violation of the Confrontation Clause.<sup>153</sup> Quoting *Crawford*, the *Bruno* Court stated “the *Crawford* Court identified earlier lower federal court cases where testimonial statements had been admitted in contravention of its interpretation of the *Con-*

148. *Id.* (quoting *Crawford*, 541 U.S. at 51).

149. *Horton*, 370 F.3d at 84. Applying *Roberts*, the First Circuit noted first that the admission of Christian’s statement fell within *Roberts* because Christian was unavailable to testify and the statements fell within a firmly rooted hearsay exception for statements evidencing the declarant’s mental state. *Id.* at 85. The First Circuit agreed with many other courts that the state of mind exception to the hearsay rule shall constitute a firmly rooted hearsay exception. *Id.*

150. 383 F.3d 65 (2d Cir. 2004).

151. *Bruno*, 383 F.3d at 77. These convictions included charges for making false statements and the obstruction of justice. *Id.*

152. *Id.* at 92.

153. *Id.* at 77-80. “Specifically, the [*Crawford*] Court held that testimonial statements of witnesses absent from trial [are to be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Id.* at 78 (internal citations omitted).



*frontation Clause*, including cases where a 'plea allocution showed [the] existence of a conspiracy and cases involving the admission of grand jury testimony."<sup>154</sup>

While the government did not dispute the applicability of *Crawford* to *Bruno*, it argued its position from a procedural standpoint: the government asserted that the Second Circuit's review was limited to plain error.<sup>155</sup> The Second Circuit rejected this argument and found the admission of the plea allocution and grand jury testimony to be plain error and exercised its discretion to vacate the convictions pertaining to the false-statement conspiracy charged.<sup>156</sup>

#### VIII. FIFTH CIRCUIT: *UNITED STATES V. ROBINSON*

In *United States v. Robinson*,<sup>157</sup> the Fifth Circuit discussed the admission of certain nonhearsay testimony yet still made note of the *Crawford* rule. After being found guilty of murder and complicity in an ongoing criminal enterprise, Robinson challenged on appeal, *inter alia*, the admission of certain testimony at his sentencing hearing.<sup>158</sup> Specifically, Robinson objected to a portion of the testimony of a man named Michael Williams, "a government informant whose testimony was used to prove the non-statutory aggravating factor that Robinson posed a future danger to the lives and safety of other persons."<sup>159</sup>

The government successfully argued that the district court had properly admitted the hearsay testimony under Federal Rule of Evidence 801(d)(2)(E), which applies to statements made by a co-conspirator during the course of, and in furtherance of the conspiracy.<sup>160</sup>

The Fifth Circuit concluded that the evidence was admissible as a co-conspirator's statement.<sup>161</sup> The only mention of the *Crawford*

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154. *Id.* (internal citations omitted) (italics in original).

155. *Id.* at 78.

156. *Bruno*, 383 F.3d at 78.

157. 367 F.3d 278 (5th Cir. 2004).

158. *Robinson*, 367 F.3d at 282, 291.

159. *Id.* at 292. Michael Williams was also known as "One Love." *Id.*

160. *Id.* at 291-92. "The proponent of the evidence under Federal Rule of Evidence 801(d)(2)(E), must prove by a preponderance of the evidence, (1) the existence of a conspiracy, (2) the statement was made by a co-conspirator, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy." *Robinson*, 367 F.3d at 292 (quoting *United States v. Solis*, 299 F.3d 420, 433 (5th Cir. 2002)).

161. *Robinson*, 367 F.3d at 292.

rule came in the middle of a footnote in the case, where after stating its conclusion that the testimony was admissible, the court noted that “[a]s applied to the present case, this conclusion is not called into doubt by *Crawford v. Washington*, because the statement challenged as hearsay was made during the course of a conspiracy and is non-testimonial in nature.”<sup>162</sup> The court did not talk about *Crawford*’s application to this case or how, if at all, it differs from other applications of *Crawford* regarding the admission of statements made by co-conspirators during the course of and in furtherance of a conspiracy.

While the Court’s decision in *Robinson* is entirely consistent with *Crawford*, it is shocking that the court even mentioned *Crawford* anywhere in its opinion. If the court was going to mention *Crawford* as it did, why did it not elaborate more on its analysis or clear up any confusion in its finding that *Crawford* does not apply? Several circuit courts have made it clear that statements which qualify as “exempted hearsay” can never be testimonial, but can there ever be an exception? If not, why was *Crawford* even mentioned in cases regarding “exempted hearsay”?

#### IX. EIGHTH CIRCUIT: *UNITED STATES V. REYES*

In *United States v. Reyes*,<sup>163</sup> an informant approached members of a Missouri drug task force and notified them of drug activity in a local trailer park.<sup>164</sup> Based on this information, undercover officers and other informants were employed to investigate the situation further.<sup>165</sup> Defendant Juan Reyes was approached by an informant named Cooper.<sup>166</sup> After discovering that Cooper was a drug dealer, Reyes “gave Cooper a gun and asked him to deliver it to Reyes’ family in Mexico.”<sup>167</sup> The other defendant in this case, Samuel Burton, also engaged in a drug transaction with officers and informants.<sup>168</sup>

A grand jury indicted the defendants along with many other conspiracy participants.<sup>169</sup> Both Reyes and Burton were linked to the conspiracy through the statements that Caasimoro Gonzalez

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162. *Id.* at 292 n.20 (internal citations omitted).

163. 362 F.3d 536 (8th Cir. 2004).

164. *Reyes*, 362 F.3d at 539.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Reyes*, 362 F.3d at 540.

made to the undercover agents while the conspiracy was taking place.<sup>170</sup> Although the grand jury had indicted Gonzalez, he pled guilty before the defendants' trial, but had not yet been sentenced at that time.<sup>171</sup> Rather than calling Gonzalez as a witness, the government introduced Gonzalez's out-of-court statements through officers who testified about what Gonzalez told them about the defendants.<sup>172</sup> In response to defense counsel calling Gonzalez as a witness, Gonzalez invoked the Fifth Amendment.<sup>173</sup>

The district court admitted Gonzalez's out-of-court statements, and the Eighth Circuit affirmed, finding that that the trial court did not err by refusing to strike the testimony about Gonzalez's statements.<sup>174</sup> The court stated that "the *Confrontation Clause* does not give the defendant the right to cross-examine a person who does not testify at trial and whose statements are introduced under the co-conspirator hearsay exclusion."<sup>175</sup> Furthermore, the court recognized that the only way the defendants could prevail under the Confrontation Clause would have been for them to show that they had a right to cross-examine Gonzalez due to the recounting of his testimony by police officers.<sup>176</sup> This was impossible because the statement is clearly nontestimonial.<sup>177</sup> The Eighth Circuit noted:

Burton cites a recent Supreme Court decision [*Crawford*] to support his *Confrontation Clause* argument. *Crawford* does not support his argument, however, because co-conspirator statements are nontestimonial. *Crawford* did not provide additional protection for nontestimonial statements, and indeed, questioned whether the *Confrontation Clause* protects nontestimonial statements at all . . . ." *Federal Rule of Evidence 801* characterizes out-of-court statements by coconspirators as exemptions from, rather than exceptions to the hearsay rule. Whether such statements are termed exemptions or ex-

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Reyes*, 362 F.3d at 540.

175. *Id.* at 541.

176. *Id.* at 540.

177. *Id.* at 541.

ceptions, the same *Confrontation Clause* principles apply.<sup>178</sup>

## X. CONCLUSION

The list of post-*Crawford* decisions will continue to grow as courts desperately try to interpret Justice Scalia's various definitions of "testimonial" from *Crawford v. Washington*. With so many exceptions to the general admissibility of hearsay as well as statements that constitute "exempted hearsay," such as admissions by party opponents and co-conspirators' statements made in furtherance of a conspiracy, it is likely that the formulation of the *Crawford* rule will continue to develop and change over time.

The Supreme Court in *Crawford* created a great deal of uncertainty as to the impact of the Confrontation Clause on the admissibility of out-of-court statements in criminal cases by providing four potential formulations of what is "testimonial." Each time a judge admits exceptional hearsay, it is likely that the defendant will raise a Confrontation Clause issue with the hopes of reversal.

It seems that *Crawford's* uncertainty will result not only in an increase in litigation, but also more confusion for the courts in determining the fine line between testimonial and nontestimonial statements. Eventually, the broadest definition of "testimonial," that statements being made with reasonable expectation that they would be used in subsequent prosecution, will likely either be re-defined or deleted in its entirety.

At the very least, our Supreme Court eventually needs to define more clearly from whose perspective this subjective, objective, or hybrid standard should be viewed. Is it from the subjective point of view of the declarant, the taker of the statement, or an outside objective person in the position of the declarant? In an area of the law as fundamental as Sixth Amendment jurisprudence, circuit courts should not be left to guess which standard of "testimonial" should apply. Without further clarification, we are no better off than we were with the lack of consistency produced by the *Roberts* rule.

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178. *Id.* at 540 n.4 & 5 (emphasis in original) (internal citations omitted).

